

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling that AT&T's)	WC Docket No. 02-361
Phone-to-Phone IP Telephony Services Are)	
Exempt From Access Charges)	

**REPLY COMMENTS OF THE NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association ("NCTA") hereby replies to the comments submitted in response to the *Petition for Declaratory Ruling* in the above-captioned proceeding.¹

NCTA is the principal trade association of the cable television industry. Its members provide cable television, broadband Internet access and telephony services throughout the United States. In addition to over 11 million broadband Internet access subscribers, and over 2.5 million residential cable telephony subscribers, its members are currently engaged in commercial trials of IP telephony services and are poised to offer such services on a commercial basis.² This comes as a result of the buildout of our broadband network.

BACKGROUND

NCTA's members are active participants in the telephony market. As of the end of 2002, major MSOs including Cox Communications, Charter Communications, Comcast Cable, Insight Communications, Mediacom, Cablevision, and AOL Time Warner, along with other cable

¹ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, filed Oct. 18, 2002 ("Petition").

² See, e.g., *Comcast Rises to VoIP Challenge*, Multichannel News, Sept. 9, 2002, at 3.

operators, served more than 2.5 million residential subscribers of cable telephony across the country. Growth in the number of telephony customers continues at a constant rate with Cox and Comcast leading the way. Companies including Cox Business Services and Cablevision Lightpath are offering telephone services to businesses as well. In addition to the deployment of circuit-switched telephony, many companies have begun trials or are launching voice over IP (“VoIP”) service. These companies include Cox and Charter Communications, Armstrong Cable, Time Warner Cable, and Comcast Cable.

The numbers demonstrate cable’s widespread entry into telephony and thus its direct and substantial interest in the Commission’s consideration of issues bearing on local telephone competition and specifically VoIP service:

- In 2002, Cox Digital Telephone, the twelfth largest telephone company in the country, continued to grow and ended the third quarter with more than 650,000 cable telephony subscribers. Cox Digital Telephone is available to nearly 3.7 million homes in nine markets with a penetration rate of 17 percent in telephony- ready homes. In its Omaha and Orange County systems, where Cox has offered the service the longest, penetration exceeds 30 percent. The service costs an average of 10 percent less than many ILECs for the first line and offers as much as a 50 percent discount on second phone lines.³
- Time Warner Cable is currently conducting a commercial trial of its service, “Line Runner,” which is being offered to 1,000 high-speed data customers in Portland, Maine, and another 1,000 customers in Rochester, New York. Line Runner is being marketed to

³ Cox Communications press releases, “Cox Communications Announces Third Quarter Financial Results for 2002,” Oct. 29, 2002; “Cox Communications Inc. Q3 Earnings Highlights,” Oct. 29, 2002; and “Cox Digital Telephone Rings Up Excellent Customer Satisfaction Ratings,” Oct. 10, 2002.

high-speed data customers, bundling VoIP and high-speed data services. Pricing for the base service is \$9.95 per month as an add-on to monthly high-speed data service.⁴

- Charter Communications currently has approximately 20,000 cable telephony subscribers. Charter has conducted VoIP technical trials in its St. Louis market and Wausau, Wisconsin. Now, Charter is conducting a marketing trial in Wausau, with hopes of expanding into other markets this year.⁵
- Comcast, which merged with AT&T Broadband in November 2002, added within historic AT&T Broadband cable systems 1.76 million homes which can receive telephony service and 423,000 new customers during the 12 months ending September 30, 2002. At the end of the third quarter 2002, Comcast had more than 1,323,000 residential customers and reported 16.5 percent penetration of its telephony homes passed, within such historic AT&T Broadband cable systems.⁶ Comcast, in its historic Comcast cable systems, currently offers circuit-switched voice telephony service to about 40,000 customers in Maryland, Michigan and Northern Virginia. Additionally, Comcast, after testing and completing VoIP trials in Union, New Jersey, Coatesville, Pennsylvania, Willow Grove, Pennsylvania, and Detroit, Michigan, plans to offer residential VoIP phone services in a portion of the Philadelphia area during mid-2003.⁷ Comcast, in conjunction with Insight Communications, also offers AT&T Broadband-branded

⁴ AOL Time Warner press release, "Time Warner Expands Internet Telephone Test to Rochester Road Runner Customers," January 31, 2001.

⁵ Charter Communications News, "Charter Reports Third Quarter 2002 Results," Nov. 5, 2002, and Breznick, Allen, *CableDatacom News*, "Cable Operators Eye IP Telephony Rollouts," Nov. 1, 2002.

⁶ AT&T Investor Relations, "Earnings Commentary-Third Quarter 2002," Oct. 22, 2002, and Kagan World Media, Broadband Technology, "Cable Telephony Shows No Signs Of Saturation," Nov. 14, 2002, at 5.

⁷ Comcast Press Release, "Comcast Announces Plans For Residential Primary-line IP Phone Service in portion of Philadelphia Market," June 27, 2002.

telephony service in five markets in Indiana, Kentucky, and Ohio. The venture had nearly 23,000 telephone customers with a penetration rate of 6.1 percent, up from 3.7 percent at the end of third quarter 2001.⁸

- Mediacom was scheduled to launch its first VoIP technical trial at the end of November 2002 in Des Moines, Iowa.⁹
- Cablevision Systems' CLEC subsidiary, Cablevision Lightpath, is marketing Cablevision Optimum Telephone Service to residential and business customers in parts of New York City, Long Island, and Connecticut. At the end of the third quarter, Cablevision had 12,325 residential telephone customers and a penetration rate of 7.8 percent in telephony-ready homes.¹⁰

DISCUSSION

The Commission has yet to squarely resolve the regulatory classification of IP telephony services, although the issue was discussed in the Commission's *Report to Congress* in 1998.¹¹ It should refrain from determining the regulatory classification of phone-to-phone IP telephony services in the context of this proceeding. Such a determination would only be appropriate in the context of a proceeding which considers the full range and breadth of phone-to-phone IP telephony services, rather than the narrow example of the one specific network configuration offered in this proceeding. The nascency of the services at issue, however, makes even such a classification proceeding premature. In addition, the Commission should make clear that

⁸ Insight Communications press releases, "Insight Communications Announces Third Quarter 2002 Results," Oct. 24, 2002.

⁹ Breznick, Allen, *Cable Datacom News*, "Cable Telephone Operators Eye IP Telephony Rollouts," Nov. 1, 2002.

¹⁰ Cablevision Investor Information, "Cablevision Systems Corporation Reports Third Quarter 2002 Financial Results," Nov. 7, 2002.

whatever decision it reaches in this proceeding applies only to the specific facts of the network configuration raised by the AT&T petition.

Many commenters nonetheless seek to use this proceeding to obtain a ruling on this fundamental issue. They expound at length their views as to whether the service at issue, phone-to-phone IP telephony in the configuration offered by AT&T, either is, or is not, a telecommunications service. The Commission should resist the demands of these commenters and address only the narrow question presented by AT&T. While NCTA expresses no position on the specific relief requested in the petition at hand, it notes that the Commission could rule on the petition without generally determining the regulatory classification of IP telephony services.

Contrary to the assertions of some commenters, the Commission has not already determined that phone-to-phone IP telephony services are telecommunications services. Verizon states, for example “the Commission *has found* that phone-to-phone Internet telephony is a telecommunications service not an enhanced service.”¹² In fact, the Commission did no such thing. Rather the Commission found, in its Report to Congress, that phone-to-phone IP telephony services “*bear the characteristics of ‘telecommunications services’*” but hastened to add that “[w]e do not believe, however, that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings.”¹³

Beyond claims that the Commission has already decided the issue, several ILEC commenters argue their view as to why the services in question should be considered

¹¹ *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501 (1998) (“*Report to Congress*”).

¹² Verizon Comments at 7 (emphasis added). See also SBC Comments at 6.

¹³ *Report to Congress*, 13 FCC Rcd. at 11535, 11544-45 (1998)(emphasis added).

“telecommunications services.”¹⁴ Other commenters contend phone-to-phone IP telephony services are enhanced services (and, by extension, information services).¹⁵ But the Commission need not make such a global determination in this rather limited proceeding. To the extent that the Commission may choose at some point in the future to examine the appropriate regulatory classification of phone-to-phone IP telephony services, the Commission should fully avail itself of the opportunity to provide notice of, and seek comment on, all relevant issues pertaining to the nature of such services before determining the appropriate regulatory classification, as it is doing in other proceedings of industry-wide and nationwide significance. The record before the Commission currently consists largely of comments filed over four years ago in the context of the *Report to Congress*, and those of a limited number of participants in this proceeding.

The Commission recognized that an appropriate regulatory classification may depend on the particulars of a service offering, even within the category of phone-to-phone IP telephony services:

Because of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.¹⁶

¹⁴ See, e.g., Qwest Comments at 6; BellSouth Comments at 2.

¹⁵ See, e.g., Global Crossing Comments at 8.

¹⁶ *Report to Congress*, 13 FCC Rcd. at 11544.

The Commission clearly understood there are different forms of IP telephony services – even within the phone to phone bucket – some of which may not even traverse the PSTN. BellSouth, in effect, acknowledges that the outcome of this proceeding may hinge on the specific network configuration considered by the Commission, and thus asks the Commission to “focus exclusively on the configuration presented by AT&T.”¹⁷ However, different types of traffic are often carried and terminated differently than in the instant scenario and, therefore, may raise different issues than those raised by AT&T. Because the configuration presented by AT&T is only one of numerous possibilities¹⁸ by which calls may travel (or not travel) over the PSTN, the Commission should not establish a precedent in this proceeding that may apply to other network configurations of phone-to-phone IP telephony service.

The nascency of VoIP services and IP telephony offers an additional reason for refraining from deciding the regulatory status of these offerings today. IP voice services are evolving technologies with the potential to bring great benefits to consumers.¹⁹ Congressional and Commission policy favor allowing nascent technologies to develop free of unnecessary regulation.²⁰ The Commission recognized both the emerging and the dynamic nature of the type

¹⁷ Bellsouth Comments at 1.

¹⁸ See, for example, Joint Comments of AISPA, et al, at 5-6 describing different IP telephony architectures.

¹⁹ See for example, Global Crossing comments at 4-5. See also VON Coalition comments at 2-5 offering a number of examples of how VoIP services have rapidly evolved over the past several years, and the benefits such services have brought. See also Joint Comments of AISPA, et al. at 5-7. See also Joint comments of ASCENT, et al. at 19-21 in particular highlighting the “ever-changing and developing nature of IP applications,” the “wide array of service that can be provided using IP technology,” and the “diversity and rapid development of VoIP enabled equipment and service applications...”

²⁰ 47 U.S.C. § 230(b)(2); “It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State Regulation...” See also *Washington Internet Daily*, August 20, 2002 quoting Commissioner Abernathy calling for regulators “to exercise restraint with new technologies and services” in order to promote competition and to reflect the fact that the government has a poor track record at predicting the marketplace. (Also reporting that NTIA Administrator Victory and Commissioner Martin agreed with Commissioner Abernathy on the need for a “nascent services doctrine.”)

of service at issue here when it stated, in its *Report to Congress* “[w]e defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.”²¹

CONCLUSION

The Commission should refrain from determining as a general matter the regulatory classification of phone-to-phone IP telephony services in this proceeding. The lack of a complete record on the classification issue, particularly as it pertains to other configurations of VoIP such as cable-provided VoIP services, and the nascent and evolving nature of the technologies involved make such a determination premature. The Commission should make clear that whatever decision it reaches in this proceeding applies only to the specific facts of the network configuration at issue in the AT&T petition.

Respectfully submitted,

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²¹ *Report to Congress* 13 FCC Rcd. at 11544.